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Before the

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	IB Docket No. 98-118
Review of International Common Carrier	)	
Regulations	)	

To: The Commission

AIRTOUCH COMMUNICATIONS, INC. AND
BELLSOUTH CORPORATION
PETITION FOR CLARIFICATION AND RECONSIDERATION

AirTouch Communications, Inc. ("AirTouch"), and BellSouth Corporation, on behalf of its affiliates and subsidiaries ("BellSouth") (collectively "Petitioners"), pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, hereby petition the Commission for clarification and reconsideration of limited portions of the *Report and Order* in the above-referenced proceeding.[1] The *Report and Order* generally does a commendable job in eliminating unnecessary and outdated regulations and simplifying existing requirements. Petitioners seek confirmation, however, that the adoption of new Section 63.21(i) does not rescind *existing* Section 214 authorizations previously obtained by carriers on behalf of their non-wholly-owned subsidiaries and partnerships they control. Petitioners also seek modification of new Section 63.18(e)(3) to eliminate inconsistencies with corresponding rules in the wireless services.

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[1] *In the Matter of 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, Report and Order*, IB Docket No. 98-118, FCC 99-51 (rel. March 23, 1999), 64 Fed. Reg. 19057 (Apr. 19, 1999) ("*Report and Order*").

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I. REQUEST FOR CLARIFICATION

New Section 63.21(i) adopted in the *Report and Order* provides that, subject to other structural separation requirements, "an authorized carrier may provide service through any wholly owned direct or indirect subsidiaries."[2] The Commission also advised carriers, however, "that if, at any time, such a subsidiary is no longer 100-percent owned by the authorized carrier, it may not operate without first obtaining its own authorization pursuant to Section 63.18."[3] The Commission concluded that "a controlling interest that does not amount to 100-percent ownership may raise additional issues, such as additional foreign affiliations or minority ownership or beneficial interest by persons or entities who are barred from holding a Commission authorization."[4]

Incumbent CMRS providers often operate through a large number of partnerships.[5] Many of these partnerships, though majority-owned and controlled by a single

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[2] 47 C.F.R. § 62.21(i); 64 Fed. Reg. at 19065.

[3] *Report and Order* ¶ 50. In reaching this determination, the Commission summarily rejected the argument that "partnerships in which the carrier has a controlling interest [should] be able to operate pursuant to the carrier's authorization." *Id.* ¶ 56.

[4] *Id.* ¶ 56.

[5] When cellular licensees were first selected by lottery, the Commission encouraged competing applicants to enter into settlement agreements by providing an "award of cumulative chances" to improve the joint venture applicant's chances of winning the lottery. *See Algreg Cellular Engineering*, 12 FCC Rcd 8148, ¶¶ 25-29 (1997); *Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 FCC 2d 175, 201, *recon. granted in part and denied in part*, 101 FCC 2d 577, 584, *further recon.*, 59 Rad. Reg. 2d (P&F) 401 (1985), *aff'd sub nom. Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987). As a result of these settlements and the lottery process generally, many partial, passive ownership interests in cellular licensees were created. *See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order*, 8 FCC Rcd. 7700, 7745 ¶ 107 (1993). These partnerships remain as the cellular licensees in many markets and, indeed, some large cellular carriers currently control dozens of such partnership

(continued...)

carrier, have limited partners with passive minority equity ownership interests. Many CMRS carriers with operations organized in this manner have sought and obtained, under a single application, international Section 214 authority for themselves and the partnerships they control. AirTouch's Section 214 application, for example, was filed on behalf of itself and "all U.S. domestic carriers controlled by AirTouch."[6] This "blanket" authorization approach was discussed in detail with Commission staff prior to filing, the application was placed on public notice, and no interested parties objected to its scope or language. The application was granted in December 1996 and has long been final.[7]

It is unclear whether the Commission, by adopting new Section 63.21(i), intended to rescind *existing*, duly-granted Section 214 authorizations obtained by carriers on behalf of their non-wholly owned subsidiaries or partnerships they control. Petitioners believe this was *not* the Commission's intent, given the complete absence of any discussion — much less adequate notice — in either the *Notice of Proposed Rulemaking*[8] or the *Report and Order*, that such action was contemplated in this proceeding. To conclude otherwise would be tantamount to a revocation of the international Section 214 authorizations properly obtained on behalf of

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[5] (...continued)
licensees.

[6] *See* AirTouch Communications, Inc., Application for Authority, filed Oct. 28, 1998, at 1 (File No. ITC-96-564). BellSouth Cellular Corp. holds a similar authorization. *See* File No. ITC-96-270.

[7] *See* Public Notice, Report No. I-8219, File No. ITC-96-564, released Dec. 5, 1996. Petitioners are aware that many other similarly-organized CMRS carriers obtained similar blanket Section 214 authorizations on behalf of their non-wholly owned subsidiaries and partnerships.

[8] *See In the Matter of 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations, Notice of Proposed Rulemaking*, IB Docket No. 98-118, 13 FCC Rcd. 13713, 13722 ¶ 22 (1998) ("*Notice of Proposed Rulemaking*").

numerous individual licensees, in contravention of the procedural safeguards of the Administrative Procedure Act ("APA").

The APA requires that, at a minimum, the Commission provide carriers notice and an opportunity to comment before terminating duly granted Section 214 authorizations.[9] Nothing in the *Notice of Proposed Rulemaking* suggested, much less stated clearly, that the Commission intended to rescind these carriers' existing, duly-granted "blanket" authorizations. Indeed, the *Notice* did not discuss in any manner the applicability of proposed Section 63.21(i) to entities holding existing Section 214 authorizations, and it made no mention whatsoever regarding Section 63.21(i)'s intended impact on non-wholly-owned subsidiaries.

In sum, the *Report and Order* cannot be properly construed to revoke existing 214 authorizations, including blanket authorizations covering non-wholly-owned subsidiaries and partnerships. As noted above, under new Section 63.21(i) "an *authorized carrier* may provide service through any wholly owned direct or indirect subsidiaries."[10] It is Petitioners' view that the term "authorized carrier" must be read to include all of the entities encompassed by the carrier's *existing* Section 214 authorization -- including the non-wholly owned subsidiaries

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[9] The APA provides, in relevant part, that "[e]xcept in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the license has been given -- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c). A Section 214 authorization clearly constitutes a "license" under the APA's definition. *See id.* § 551(8) (defining "license" as "the whole or a part of an agency permit, *certificate*, approval, registration, charter, membership, statutory exemption *or other form of permission*") and 47 U.S.C. § 214(a) (describing Section 214 authorization as "a *certificate* that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line") (emphasis added); *Air North America v. DOT*, 937 F.2d 1427, 1437 (9th Cir. 1991) ("definition of license in the APA is extremely broad"); *ARCO v. United States*, 774 F.2d 1193, 1200 (D.C. Cir. 1985) (same).

[10] 47 C.F.R. § 62.21(i) (emphasis added); 64 Fed. Reg. at 19065.

and partnerships it alone controls. Petitioners respectfully request that the Commission confirm this interpretation of its rules.

II. PETITION FOR RECONSIDERATION

The *Report and Order* codifies filing requirements that, previously, carriers had undertaken informally or at staff request. There is one instance, however, where a rule adopted in this proceeding is inconsistent with a corresponding rule adopted in the ULS proceeding applicable to wireless carriers.[11]

Under new Section 63.18(e)(3) of the rules, carriers must notify the Commission within 30 days of either (1) the consummation of an authorized substantial assignment or transfer of control, or (2) a decision not to consummate an authorized substantial assignment or transfer of control.[12] These procedures vary from those applicable to wireless services. The Commission's new ULS rules require that "[f]or transfers and assignments that require prior Commission approval, the transaction must be consummated and notice provided to the Commission within 60 days of public notice of approval, unless a request for an extension of time to consummate is filed on FCC Form 603 prior to the expiration of this 60-day period."[13] Thus, for international authorizations, the triggering event for a filing obligation is the consummation of the transaction, while for wireless carriers, the triggering event is the

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[11] *Biennial Regulatory Review —Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services; Amendment of the Amateur Service Rules to Authorize Visiting Foreign Amateur Operators to Operate Stations in the United States, Report and Order*, WT Docket No. 98-20, 13 FCC Rcd. 21027 (1998) ("*ULS Report and Order*").

[12] *Report and Order* ¶ 83.

[13] *See* 47 C.F.R. § 1.948(d).

Commission's approval of the transaction. In addition, the number of days allotted to file the requisite notification differs as well.

In the ULS proceeding, the Commission recognized the value to the entities it regulates of uniform application processes. The Commission noted that its pre-ULS "patchwork approach to application processing has caused a significant waste of time and resources on the part of applicants and licensees, who must often file duplicative information in different databases following varying procedures."[14] Consistency between wireless and non-wireless services will help to minimize these problems as well.

For transactions that affect all of a carrier's international authorizations and radio licenses, conformity between the ULS rules and the Commission's rules for transfers and assignments will further simplify carriers' regulatory compliance efforts. Petitioners therefore request that the Commission eliminate the inconsistency by modifying the language of Section 63.18(e)(3) to conform with Section 1.948(d).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission: clarify that carriers currently authorized to provide service through non-wholly owned

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[14] *ULS Report and Order*, 13 FCC Rcd. at 21030 ¶ 2.

subsidiaries and partnerships need not obtain separate Section 214 authority for such existing entities; and modify Section 63.18(e)(3) to conform with Section 1.948(d).

Respectfully submitted,

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